In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1842

GEORGE T. ADAMS,
Petitioner,

vs.

SOUTHERN CALIFORNIA FIRST NATIONAL BANK,
Respondent.

WILLIE O. HAMPTON and MATTIE HAMPTON,
Individually, and on behalf of all others similarly situated,
Petitioners,

vs.

THE BANK OF CALIFORNIA,
National Association, a California banking corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Table of Contents

	Page
Question presented	2
I. Appellate court decisions on the question presented in the case at bar are uniform and there is no need for review by this court	2
II. The decision of the court of appeals is in accord with the pertinent decisions of this court	4
Conclusion	9

Table of Authorities Cited

Cases	Pages
Adickes v. Kress & Co., 398 U.S. 144	4, 8
Bichel Optical Lab., Inc. v. Marquette Nat. Bk. of Mpls., 487 F.2d 906	3
Brown v. United States National Bank of Oregon, 509 P.2d 442	3
Burton v. Wilmington Pkg. Auth., 365 U.S. 715	4, 5, 6
Crosswhite v. American Insurance Co., 61 Cal.2d 300, 392 P.2d 5	6
Evans v. Abney, 396 U.S. 435	4
Evans v. Newton, 382 U.S. 296	4, 5
Jackson v. Metropolitan Edison Company, 483 F.2d 754, certiorari granted ..... U.S. ....., 94 S.Ct. 1407	3
James v. Pinnix, ... F.2d	3
Kruger v. Wells Fargo Bank, 11 Cal.3d 352, ... P.2d	3, 8
Liver v. Mills, 155 Cal. 459, 101 Pac. 299	6
Lombard v. Louisiana, 373 U.S. 267	8
Marsh v. Alabama, 326 U.S. 501	5
McCabe v. A., T. & S. F. Ry. Co., 235 U.S. 151	8
Moose Lodge No. 107 v. Irvis, 407 U.S. 163	4, 7
Nichols v. Tower Grove Bank, 4 CCH Secured Transactions Guide ¶52,355, ... F.2d	2
Nixon v. Condon, 286 U.S. 73	5
Northside Motors of Florida, Inc. v. Brinkley, 282 So.2d 617	3
Nowlin v. Professional Auto Sales, et al., 4 CCH Secured Transactions Guide ¶52,351, ... F.2d	2
Peterson v. Greenville, 373 U.S. 244	8
Public Utilities Comm'n v. Pollak, 343 U.S. 451	3
Reitman v. Mulkey, 387 U.S. 369	4, 7
Robinson v. Florida, 378 U.S. 153	8

Pages

Shelley v. Kraemer, 334 U.S. 1 8
Shirley v. State National Bank of Connecticut, 493 F.2d 739, petition for rehearing en banc denied F.2d 3
Silverstin v. Kohler & Chase, 181 Cal. 51 6
Smith v. Allwright, 321 U.S. 649 5

Terry v. Adams, 345 U.S. 461 5

United States v. Guest, 383 U.S. 745 4
United States v. Price, 383 U.S. 787 4

Williams v. United States, 341 U.S. 97 ..... 4, 5

Constitution

United States Constitution, Fourteenth Amendment 2, 3, 4

Statutes

California Commercial Code § 9503 2

California Commercial Code § 9504 2

The Civil Rights Act (R.S. § 1979, 42 U.S.C. § 1983)..2, 3, 4, 8, 9

Other Authorities

Cooley's Blackstone, Volume 2 6

Holdsworth, A History of English Law, Volume 3 6

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QUESTION PRESENTED

Petitioners' statement of the question presented (Petition, pp. 2-3) is inaccurate. The only question considered in *Hampton v. Bank of California* by the District Court (Appendix D to Petition, p. 60) or by the Court of Appeals (Appendix A to Petition, p. 6) and the only question considered by the Court of Appeals in *Adams v. Southern California First National Bank* (ibid.) is:

> Whether the historic private remedy of peaceful self-help repossession as permitted by California Commercial Code §§ 9503 and 9504 constitutes state action within the purview of the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act (R.S. § 1979, 42 U.S.C. § 1983).

Consequently, that is the only question before this Court.

I. APPELLATE COURT DECISIONS ON THE QUESTION PRESENTED IN THE CASE AT BAR ARE UNIFORM AND THERE IS NO NEED FOR REVIEW BY THIS COURT.

There is no need for the Court to review the decision of the United States Court of Appeals for the Ninth Circuit in the case at bar. That decision is consistent with the decision of every other circuit which has considered the question.

> *Nowlin v. Professional Auto Sales, et al.* (8 Cir. Apr. 25, 1974, Nos. 73-1348, 73-1450) 4 CCH Secured Transactions Guide ¶52,351, ... F.2d —;
>
> *Nichols v. Tower Grove Bank* (8 Cir. May 13, 1974, No. 73-1621) 4 CCH Secured Transactions Guide ¶52,355, ... F.2d .....;

Shirley v. State National Bank of Connecticut (2 Cir. 1974) 493 F.2d 739, petition for rehearing en banc denied (Mar. 29, 1974) ..... F.2d .....;
James v. Pinnix (5 Cir. June 10, 1974, No. 73-1866) ..... F.2d .....[1]

It is also consistent with every state supreme court decision of which we are aware (*Brown v. United States National Bank of Oregon* (Or. 1973) 509 P.2d 442 and *Northside Motors of Florida, Inc. v. Brinkley* (Fla. 1973) 282 So.2d 617).[2]

In each of those cases, the court held that there was no state action within the purview of the Fourteenth Amendment to the Constitution of the United States or the Civil Rights Act (R.S. § 1979, 42 U.S.C. § 1983).

Nor does the fact that this Court has granted certiorari in *Jackson v. Metropolitan Edison Company* (3 Cir. 1973) 483 F.2d 754, certiorari granted (1974) ..... U.S. ....., 94 S.Ct. 1407 (Petition, p. 10) provide reason for granting certiorari in the case at bar. That case concerns a public utility which performs a state function in providing public utility service under tariffs approved by a public utilities commission (see *Public Utilities Comm'n v. Pollak* (1952) 343 U.S. 451, 462). Consequently, the question whether

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[1]Similarly, the Eighth Circuit in *Bichel Optical Lab., Inc. v. Marquette Nat. Bk. of Mpls.* (8 Cir. 1973) 487 F.2d 906, held that the seizure by a bank of a borrower's funds and collateral in the form of accounts receivable without notice as permitted by state statute did not constitute state action.

[2]Similarly, in *Kruger v. Wells Fargo Bank* (Apr. 26, 1974) 11 Cal.3d 352, ... P.2d ....., the California Supreme Court held that a banker's exercise of the right of setoff permitted by a statute which codified a right existing under common law was not state action.

its action in cutting off electric service to a customer in accordance with such tariffs constituted state action presents a different issue than does the case at bar.

II. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE PERTINENT DECISIONS OF THIS COURT.

The decision of the Court of Appeals is in accord with the decisions of this Court on the meaning of state action under the Fourteenth Amendment and the Civil Rights Act (R.S. § 1979, 42 U.S.C. § 1983).

Moose Lodge No. 107 v. Irvis (1972) 407 U.S. 163, 173;

Adickes v. Kress & Co. (1970) 398 U.S. 144, 152, 170;

Reitman v. Mulkey (1967) 387 U.S. 369, 380;

Burton v. Wilmington Pkg. Auth. (1961) 365 U.S. 715, 722-725; and

Williams v. United States (1951) 341 U.S. 97, 99-100.[3]

In *Adickes v. Kress & Co.* (1970) 398 U.S. 144, 152, this Court held that when private individuals act jointly with state officials their action is state action under the Civil Rights Act.[4] Similarly, this Court found state action

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[3]These are the leading cases on the meaning of state action. Other cases cited by petitioners (Petition, pp. 11-12) are substantially to the same effect (see footnotes 4, 5 and 7, infra).

[4]To the same effect, see *United States v. Price* (1966) 383 U.S. 787, 799-800; *United States v. Guest* (1966) 383 U.S. 745, 756-757; and *Evans v. Newton* (1966) 382 U.S. 296, 301; cf. *Evans v. Abney* (1970) 396 U.S. 435, 444-445.

in *Burton v. Wilmington Pkg. Auth.* (1961) 365 U.S. 715, 722-725, when a private restaurant which was "operated as an integral part of a public building devoted to a public parking service" (365 U.S. 724) refused service to blacks. The Court held that

> "the State has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment" (365 U.S. 725).

In *Williams v. United States* (1951) 341 U.S. 97, 99-100, the finding of state action was based on delegation of a public function to a private individual[5] as well as a joint action between the private individual and a public official. In the instant case, there is no suggestion that respondents were acting jointly with state officials, there is no relationship of the type deemed sufficient to constitute state action in *Burton* and there is no delegation of public function to private individuals.

Rather the state law, in accord with common-law precedents, merely permits the private action involved in these cases. At common law a private person who had title to personal property had the right to repossess that

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[5]To the same effect, see *Evans v. Newton* (1966) 382 U.S. 296, 301-302; *Terry v. Adams* (1953) 345 U.S. 461, 469-470; *Marsh v. Alabama* (1946) 326 U.S. 501, 506-509; *Smith v. Allwright* (1944) 321 U.S. 649, 663-664; and *Nixon v. Condon* (1932) 286 U.S. 73, 88-89.

property, provided it be done without breach of the peace (*Silverstin v. Kohler & Chase* (1919) 181 Cal. 51, 54, 183 Pac. 451, 452; *Liver v. Mills* (1909) 155 Cal. 459, 462, 101 Pac. 299, 300; *Crosswhite v. American Insurance Co.* (1964) 61 Cal.2d 300, 302, 392 P.2d 5, 6).[6] Should the pertinent statutes be declared unconstitutional, the respondents could still exercise their common-law rights to repossess.

The fallacy in the argument advanced by Judge Hufstedler in her dissent from denial of hearing en banc (Appendix B to Petition, pp. 34-39), a portion of which is quoted by petitioners (Petition, p. 14), is that she assumes the state has empowered private creditors to do what they could not otherwise do. As shown above, peaceful repossession is a common-law right which private individuals possess regardless of statute. Judge Hufstedler points to the regulation of repossession without discerning that these regulations do not empower private creditors to do what they could not otherwise do, but rather provide debtors protections which they do not have under common law.

Moreover, that the state has an economic interest in the automobile industry is not a reason for finding state action (Petition, p. 14); presumably most contracts made in the state benefit its economy, yet the making of a contract does not constitute state action. Clearly, this is not a *Burton* type interdependent relationship constituting state action.

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[6]The long history of the common-law right of peaceful self-help repossession or recapture is documented in 3 Holdsworth, A History of English Law (3d Ed. 1923) p. 279, and 2 Cooley's Blackstone (4th Ed. 1899) pp. 857-858.

In *Reitman v. Mulkey* (1967) 387 U.S. 369, 376, this Court affirmed a finding by the California Supreme Court that the state had so significantly involved itself in private racial discrimination as to constitute state action when it adopted a state policy of encouraging housing discrimination by amending its constitution to overturn present laws and prevent future legislation prohibiting housing discrimination. This Court noted that the California Supreme Court had found the amendment "designed to make private discriminations legally possible" (387 U.S. 375), " 'to overturn state laws that bore on the right of private sellers and lessors to discriminate' " (387 U.S. 374) and "to create a constitutional right to discriminate on racial grounds in the sale and leasing of real property" (387 U.S. 376). It emphasized that the state was encouraging discriminatory action which had previously been illegal, and made clear that legislation, merely permitting private action was not state action. It rejected the suggestion that the state court had ruled "that a State may never put in statutory form an existing policy of neutrality with respect to private discriminations" (387 U.S. 376).

That mere permission by the state for action by private persons—whether or not that action would otherwise violate due process—does not make private action into state action was again made clear in *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 163. In that case, this Court held that a state license to serve alcoholic beverages in a private club, which refused to serve blacks, was not a significant involvement constituting state action (407 U.S. 173-175).

On the other hand, the Court held that regulations of the State Liquor Control Board which required the club to adhere to provisions of its by-laws, which discriminated against blacks, constituted state action in violation of the Civil Rights Act (407 U.S. 177-179). This is in accord with the holding of *Adickes v. Kress & Co.* (1970) 398 U.S. 144, 170, that a private act is state action when the state, by its law, has compelled the act.[7] Clearly, under California law, there was no requirement that respondents take possession of the automobiles involved in the instant case.

As was pointed out by the California Supreme Court in *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, all private action undertaken pursuant to the common law does not constitute state action:

> "Our review of the cases discussing the constitutionality of prejudgment remedies further confirms our conclusion that the courts have not accepted plaintiff's claim that judicial acceptance of common law remedies constitutes state action. Of those many decisions declaring particular creditors' remedies unconstitutional, none found their rulings upon such a theory; those decisions that hold that common law self-help remedies lie beyond the scope of the Fourteenth Amendment likewise reject, either expressly or by implication, plaintiff's contention" (11 Cal.3d 364).

To hold that otherwise private action—neither compelled by, nor joined in by, the state—constitutes state action

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[7]To the same effect, see *Peterson v. Greenville* (1963) 373 U.S. 244, 247-248; *Lombard v. Louisiana* (1963) 373 U.S. 267, 273-274; *Robinson v. Florida* (1964) 378 U.S. 153, 155-156; *Shelley v. Kraemer* (1948) 334 U.S. 1, 19-20; and *McCabe v. A., T. & S. F. Ry. Co.* (1914) 235 U.S. 151, 161-162.

because it is permitted by state statutes which codify the common law would unreasonably extend the jurisdiction of the Federal courts under the Civil Rights Act. As the Court of Appeals pointed out, "Statutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conf rms to state law to the Fourteenth Amendment would emasculate the state action concept" (Appendix A to Petition, p. 12).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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